

**UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT**

BAP No. MB 98-051

**IN RE: 1095 COMMONWEALTH AVENUE CORP.
IN RE: BAHIG F. BISHAY**

**1095 COMMONWEALTH AVENUE CORP. AND
BAHIG F. BISHAY,
Appellants,**

v.

**CITIZENS BANK OF MASSACHUSETTS,
Appellee.**

**Appeal from the United States Bankruptcy Court
for the District of Massachusetts
[Hon. Carol J. Kenner, Bankruptcy Judge]**

**Before
GOODMAN, DE JESÚS, and CARLO, Bankruptcy Judges**

**Harold Brown, L. Michael Hanks and Harold Brown & Associates, on brief for
appellants.**

**James W. Stoll, Elise Busny and Brown, Rudnick, Freed & Gesmer, P.C., on brief
for the appellee.**

July 14, 1999

Per Curiam.

SUMMARY

In these consolidated cases, debtors Bahig Bishay and 1095 Commonwealth Avenue Corp., (collectively "Bishay"), appeal from the denial of their Motion to Clarify and Amend the Reservation Clause in the April 23, 1996 Confirmed Plan of Reorganization, Nunc Pro Tunc, and to Declare that the Alleged Claims of the Debtor are Non-Core, (the "Motion to Clarify and Amend"). The Motion to Clarify and Amend was filed years after confirmation and substantial consummation, and only after the state court entered an adverse ruling in litigation Bishay willingly spent two years pursuing in the state court. In Bishay's own words, the Motion to Clarify and Amend was filed with the bankruptcy court "for the purpose of correcting the misunderstanding of the Norfolk Superior Court as to the matters expressly reserved by the Bankruptcy Court for adjudication in the Norfolk Superior Court." Appellant's Brief, p. 9. The bankruptcy court refused to review the state court judgment, concluding that the "Debtors' remedy is in the state appellate courts." The determination to give full faith and credit to the state court judgment is a conclusion of law, reviewed de novo by this panel. Bruin Portfolio, LLC v. Leicht (In re Leicht), 222 B.R. 670, 671 (B.A.P. 1st Cir. 1998).

JURISDICTION

The Bankruptcy Appellate Panel has jurisdiction of the appeal pursuant to 11 U.S.C. §158(b).

FACTS

Citizens Bank of Massachusetts ("Citizens") filed a lawsuit against Bishay in June of 1995 in Norfolk County Superior Court (the "state court case"). In that action, Bishay filed a counterclaim. Thereafter, on July 25, 1995, Bahig Bishay, as sole shareholder of 1095 Commonwealth Avenue Corp., caused it to file a voluntary Chapter 11 petition and in September of 1995, Bahig Bishay filed his individual Chapter 11 petition. The two bankruptcy cases were consolidated. On April 23, 1996, a plan of reorganization was confirmed. Citizens's claim against Bishay was dealt with in the plan and a reservation clause addressed Bishay's right to proceed with his counterclaim in the state court case as follows:

The debtors' estates may retain, and by its duly authorized agent representative(s) settle, release or prosecute, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the "Alleged Claims").

In November of 1996, Citizens's first motion for summary judgment was denied without prejudice, and Bishay was allowed to file an amended counterclaim. Thereafter, Citizens filed a second motion to dismiss, seeking dismissal of all counts on the grounds that Bishay's claims were either barred by the doctrine of res

judicata by the April 23, 1996 order confirming the plan and on the additional grounds that Bishay had previously released the very claims that were being asserted as counterclaims. Bishay opposed Citizens's motion for summary judgment, on the grounds that his claims were not barred by res judicata, the reservations clause was broad enough to cover his amended counterclaims, and the release did not preclude litigation of the claims.

The state court ruled on the summary judgment motion, granting a significant portion of Citizens's motion, the parties each filed motions for reconsideration, and the court issued its decision on February 17, 1998, affirming summary judgment in favor of Citizens on counts I, II, IV and V on the ground that the Bankruptcy Court's April 23, 1996 Confirmation Order constituted "res judicata as to those claims," and on Count III and subparts a,b,c,d,e,g,h,i,j,l, and m of Count VI on the grounds that a "valid and binding general release in the parties' September 16, 1994 Forbearance Agreement precluded Bishay from asserting any claims against Citizens arising from the parties' relationship prior to that date." Memorandum of Decision dated February 17, 1998, p.2.

It was only after entry of the adverse state court ruling that Bishay attempted to obtain review in the bankruptcy court purportedly for the purpose of clarifying and interpreting the

reservation clause in the confirmed plan.¹

DISCUSSION

Bishay argues that the Motion to Clarify and Amend is only a request for clarification, not a request to modify the plan. In this case, it is a distinction without a difference because Bishay cannot prevail on either theory.

If Bishay's motion is characterized as a request for clarification or plan interpretation, the bankruptcy court and state court have concurrent jurisdiction. City of Brady v. Sanders, 936 F.2d 212, 218 (5th Cir. 1991). Since Bishay voluntarily litigated the scope of the reservation clause and release in another court, Bishay cannot re-litigate those issues in the bankruptcy court. In the case of City of Brady v. Sanders, 936 F.2d at 217, the Fifth Circuit Court of Appeals concluded that appellants, having voluntarily taken the determination of their rejection damages claim to state court, could not re-litigate the issues in bankruptcy court, even if the state court's ruling was erroneous. The Fifth Circuit affirmed the bankruptcy court's determination that appellants' claim for damages arising from the debtor's rejection of an executory contract was a matter for which the state court had concurrent jurisdiction. Id. When the state court entered summary judgment against them on the grounds that the

¹ Bishay also admits that he has appealed the state court's ruling to the state appellate court.

confirmed plan operated as res judicata precluding their claim, the appellants sought relief in the bankruptcy court. The bankruptcy court determined that the state court judgment, even if erroneous, was entitled to full faith and credit. City of Brady v. Sanders, 936 F.2d at 216.

In Bishay's case, the issues relating to plan interpretation of the scope of Bishay's reservation of claims and release could have been litigated in either the bankruptcy court or the state court. Bahig Bishay and 1095 Commonwealth Avenue Corp. took their chances with the state court and cannot now re-litigate the same issues here. The state court judgment entered against Bishay is entitled to full faith and credit. 28 U.S.C. §1738.

Although the bankruptcy court did not expressly use the words substantially consummated when the bankruptcy court's statements² are considered in context, it is evident that the court denied Bishay's Motion to Amend, in part, because the confirmed plan had been substantially consummated and could not be modified. 11 U.S.C. §1127(b). Whether or not a plan has been substantially consummated is a question of fact, Matter of Potts, 188 B.R. 575, 579 (Bankr. N.D. Ind. 1995), reviewed for clear error on appeal.

² The bankruptcy court stated the following: "[t]hese two chapter 11 cases essentially ended long ago. This Court, after lengthy hearings, confirmed the Plan of Reorganization in April, 1996-more than two years ago..(sic) Creditors received payment under that Plan. The Debtors now complain that certain recent state court rulings were erroneous. But the Debtors' remedy is in the state appellate courts, not here." Bankruptcy Court's June 19, 1998 Memorandum on the Motion to Clarify and Amend.

In re Bullion Enterprises, Inc., 185 B.R. 726, 728 (W.D. Va. 1995). If Bishay's motion is characterized as seeking post-confirmation plan modification, Bishay bears the burden of proving that the plan has not been substantially consummated, Matter of Potts, 188 B.R. 575, 579 (Bankr. N.D. Ind. 1995), and if substantially consummated, post-confirmation modifications will not be allowed. 11 U.S.C. §1127(b). Bishay did not offer any evidence that the confirmed plan is anything but substantially consummated. To the extent Bishay is seeking to modify a confirmed plan, Bishay's motion is not timely and the bankruptcy court correctly denied Bishay's Motion to Clarify and Amend.

The bankruptcy court's June 19, 1998 Memorandum on the Motion to Clarify and Amend is affirmed.